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23 **UNITED STATES DISTRICT COURT**
24 **SOUTHERN DISTRICT OF CALIFORNIA**

25 HAROLD BROWER and MELINDA
26 FERGUSON, on behalf of themselves, all
27 others similarly situated, and the general
28 public,

Plaintiffs,

v.

CAMPBELL SOUP COMPANY,

Defendant.

Case No. 16-cv-1005-BEN-AGS

PLAINTIFFS' NOTICE OF APPEAL

Judge: Hon. Roget T. Benitez

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT, plaintiffs Harold Brower and Melinda Ferguson
3 hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment
4 entered against them on March 21, 2017 (Exhibit A), as well as the Court's March 21, 2017
5 Order granting defendant's motion to dismiss preceding the judgment (Exhibit B). A service
6 list for the appeal is attached hereto as Exhibit C.

7
8 Dated: March 24, 2017

Respectfully submitted,

9 /s/ Jack Fitzgerald

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Attorneys for Plaintiffs

Exhibit A



United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

HAROLD BROWER and MELINDA
FERGUSON, on behalf of themselves,
all others similarly situated, and the
general public

Plaintiff,

v.

CAMPBELL SOUP COMPANY

Defendant.

Civil Action No. 16cv1005-BEN-AGS

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

Defendant's motion to dismiss is granted. (ECF No. 17). Defendant's motion for Rule 11 sanctions is denied. (ECF No. 18). Plaintiffs' cross-motion for Rule 11 sanctions is denied. (ECF No. 20).

Date: 3/21/17

CLERK OF COURT
JOHN MORRILL, Clerk of Court

By: s/ T. Hernandez

T. Hernandez, Deputy

Exhibit B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HAROLD BROWER and MELINDA
FERGUSON, on behalf of themselves, all
others similarly situated, and the general
public,

Plaintiffs,

v.

CAMPBELL SOUP COMPANY,

Defendant.

Case No.: 3:16-cv-01005-BEN-JLB

ORDER:

- (1) GRANTING MOTION TO DISMISS (ECF No. 17);**
- (2) DENYING MOTION FOR SANCTIONS (ECF No. 18);**
- (3) DENYING CROSS-MOTION FOR SANCTIONS (ECF No. 20)**

Plaintiffs Harold Brower and Melinda Ferguson (collectively, “Plaintiffs”) allege that Defendant Campbell Soup Company’s (“Defendant” or “Campbell Soup”) Chunky Healthy Request Grilled Chicken & Sausage Gumbo is falsely and misleadingly labeled and advertised as healthy when, in fact, it contains artificial trans fat, a substance harmful to human health. (Am. Compl., ECF No. 16). Now before the Court are three motions: (1) Defendant Campbell Soup’s Motion to Dismiss Plaintiffs’ First Amended Consolidated Class Action Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (ECF No. 17); (2) Campbell Soup’s Motion for Sanctions under

1 Federal Rule of Civil Procedure 11 against Jack Fitzgerald and the Law Office of Jack
2 Fitzgerald, PC (ECF No. 18); and (3) Plaintiffs' Cross-Motion for Rule 11 Sanctions
3 against Campbell Soup, Dale Giali, and Kirstin Mazzeo (ECF No. 20). Campbell Soup's
4 primary argument in its motion to dismiss is that Plaintiffs' claims are preempted by
5 federal law. The Rule 11 motions arise from Defendant's contention that Plaintiffs'
6 claims are preempted.

7 For the reasons discussed below, the Court **GRANTS** the motion to dismiss
8 because Plaintiffs' claims are expressly preempted by federal law. The Court **DENIES**
9 both motions for Rule 11 sanctions.

10 **I. FACTUAL BACKGROUND¹**

11 Campbell Soup manufactures, markets, and sells to consumers Healthy Request
12 Chunky Grilled Chicken & Sausage Gumbo soup (the "Product" or "Healthy Request
13 Gumbo"). (Am. Compl. ¶ 1). The Product contains an artificial trans fat in the form of
14 partially hydrogenated soybean oil. (*Id.*)

15 The consumption of artificial trans fat substantially harms health, and scientific
16 studies demonstrate that there is no threshold intake level of artificial trans fat that does
17 not increase the risk of heart disease. (*Id.* ¶¶ 2, 14-34). Artificial trans fat consumption is
18 also linked to increased risk of diabetes, cancer, and Alzheimer's disease. (*Id.* ¶¶ 2, 26-
19 30). Due to these health risks, in June 2015, the Food and Drug Administration ("FDA")
20 announced that partially hydrogenated oils ("PHOs"), the primary dietary source of
21 industrially-produced trans fats, are no longer generally recognized as safe ("GRAS") for
22 use in human food. (*Id.* ¶ 34 (citing Final Determination Regarding Partially
23 Hydrogenated Oils, 80 Fed. Reg. 34650 (June 17, 2015))). The FDA gave the food
24 industry three years to remove PHOs from processed foods or receive approval for PHO
25 use. (*Id.*)

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28 ¹ The Court is not making any findings of fact, but rather summarizing the relevant
allegations of the complaint for purposes of evaluating Defendant's motion to dismiss.

1 Despite the health risks associated with trans fats, Campbell Soup markets Healthy
2 Request Gumbo as a healthy product. (*See id.* ¶¶ 35-45, 50-52). The Product’s
3 packaging includes the following labels: (1) “Healthy Request;” (2) “Heart Healthy;” (3)
4 “COOKED WITH CARE;” (4) “Made with Lean Chicken Meat;” (5) American Heart
5 Association (“AHA”) “CERTIFIED” emblem and “Meets Criteria for Heart-Healthy
6 Food;” and (6) vignettes of vegetables and grains. (*Id.* ¶ 50). The labeling omits
7 information about the presence of trans fats and their health effects. (*Id.* ¶ 51). The
8 Product’s packaging also fails to disclose that Campbell Soup paid for the AHA
9 certification emblem. (*Id.* ¶¶ 42-43, 54). Plaintiffs contend that the Product’s labels,
10 taken individually and as a whole, are false and misleading because they suggest that the
11 Product is healthy when, in fact, the presence of trans fats makes it detrimental to health.
12 (*Id.* ¶¶ 50, 52).

13 Plaintiffs purchased and consumed Healthy Request Gumbo in reliance on the
14 health and wellness claims conveyed through the Product’s labeling. (*Id.* ¶¶ 59-63).
15 They have been injured by spending money on a product that was worth less than what
16 Plaintiffs paid for it. (*Id.* ¶ 68). Had Plaintiffs known about the presence and detrimental
17 health effects of artificial trans fat in Healthy Request Gumbo, Plaintiffs would not have
18 purchased the Product or would not have purchased as much of it. (*Id.* ¶¶ 67, 69-71).
19 Plaintiffs have also been injured by their increased risk of heart disease and other
20 morbidity as a result of consuming Healthy Request Gumbo. (*Id.* ¶ 62).

21 Plaintiffs bring a complaint alleging violations of California’s Unfair Competition
22 Law (“UCL”), False Advertising Law (“FAL”), and Consumer Legal Remedies Act
23 (“CLRA”), and breaches of express warranties and the implied warranty of
24 merchantability under California’s Commercial Code.

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1 II. DEFENDANT’S MOTION TO DISMISS

2 A. Legal Standard

3 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) must be
4 granted where the pleadings fail to state a claim upon which relief can be granted.² When
5 considering a Rule 12(b)(6) motion, the court must “accept as true facts alleged and draw
6 inferences from them in the light most favorable to the plaintiff.” *Stacy v. Rederite Otto*
7 *Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must not merely allege
8 conceivably unlawful conduct but must allege “enough facts to state a claim to relief that
9 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim
10 is facially plausible ‘when the plaintiff pleads factual content that allows the court to
11 draw the reasonable inference that the defendant is liable for the misconduct alleged.’”
12 *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556
13 U.S. 662, 678 (2009)). “Threadbare recitals of the elements of a cause of action,
14 supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

15 B. Request for Judicial Notice

16 Defendant asks the Court to take judicial notice of a copy of the packaging label
17 for Healthy Request Gumbo in use during the class period. (See Request for Judicial
18 Notice (“RJN”) Ex. A). Federal Rule of Evidence 201 authorizes a court to take judicial
19 notice of facts “not subject to reasonable dispute because [they] . . . can be accurately and
20 readily determined from sources whose accuracy cannot reasonably be questioned.” Fed.
21 R. Evid. 201(b). A court may take judicial notice of documents “whose contents are
22 alleged in a complaint and whose authenticity no party questions, but which are not
23 physically attached to the plaintiff’s pleading.” *Knievel v. ESPN*, 393 F.3d 1068, 1076
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26 ² Defendant also moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the
27 basis that Plaintiffs lack standing. Because the Court considers the preemption argument
28 under Rule 12(b)(6) controlling, the Court need not evaluate the complaint under Rule
12(b)(1).

1 (9th Cir. 2005). Here, Plaintiffs’ entire case theory depends on the labels on Healthy
2 Request Gumbo, to which they refer extensively in their complaint. Plaintiffs do not
3 dispute the authenticity of the image provided by Defendant. Accordingly, the Court
4 takes judicial notice of Exhibit A to the Declaration of Dale J. Giali.

5 **C. Analysis**

6 Campbell Soup contends that Plaintiffs’ claims are expressly preempted by the
7 Poultry Products Inspection Act (“PPIA”) and the Federal Meat Inspection Act
8 (“FMIA”).³ It argues that where, as here, the U.S. Department of Agriculture (“USDA”)
9 has pre-approved a particular label, the PPIA and FMIA bar a state from deeming the
10 label false, misleading, or otherwise unlawful.

11 Congress enacted the PPIA and FMIA to prevent the interstate distribution of
12 adulterated and misbranded poultry and meat. 21 U.S.C. §§ 452, 602. The statutes
13 prohibit the sale of products with false or misleading labeling or marking. 21 U.S.C. §§
14 457(c), 607(d); *see also Del Real, LLC v. Harris*, 636 F. App’x 956, 957 (9th Cir. 2016)
15 (“[W]e have previously interpreted the legislative history of the FMIA and PPIA as
16 clearly show[ing] the intent of Congress to create a uniform national labeling standard.”).
17 Pursuant to those statutes, the USDA’s Food Safety and Inspection Service (“FSIS”)
18 inspects and approves product labels. 9 C.F.R. § 412.1(a). A label must be approved
19 before products bearing that label are sold in interstate commerce. *Id.* It is undisputed
20 that FSIS approved Healthy Request Gumbo’s label. (*See* Mot. at 5-6; Opp’n at 13; RJN
21 Ex. A).

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26 ³ Healthy Request Gumbo includes both chicken and meat (*see* RJN Ex. A), therefore the
27 provisions of the FMIA and PPIA apply. *See* 21 U.S.C. § 601 *et seq.* (FMIA applies to
28 “meat,” which includes pork); 21 U.S.C. §§ 453(e), (f) (PPIA applies to “poultry” and
“poultry products”).

1 The PPIA and FMIA include identical express preemption provisions.⁴ Those
2 statutes preempt state law if (1) the state law imposes marking, labeling, packaging, or
3 ingredient requirements; and (2) these requirements are “in addition to, or different than”
4 than the requirements imposed under federal law. *See* 21 U.S.C. §§ 467(e) (PPIA); 678
5 (FMIA); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, * 5
6 (N.D. Cal. July 25, 2013) (dismissing UCL, FAL, and CLRA claims against Campbell
7 Soup’s Natural Chicken Tortilla soup as preempted under the PPIA and FMIA). State
8 statutory and common law can impose requirements that satisfy the first prong. *See*
9 *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). With respect to the second
10 condition, a state requirement is additional or different than federal requirements if it is
11 not “equivalent” or “parallel.” *Riegel*, 552 U.S. at 330; *Bates v. Dow Agrosciences LLC*,
12 544 U.S. 431, 447 (2005).

13 To determine whether Plaintiffs’ claims are expressly preempted by these statutes,
14 a court “must consider the theory of each claim and determine whether the legal duty that
15 is the predicate of that claim is inconsistent” with federal law. *Metrophones Telecomms.,*
16 *Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1075 (9th Cir. 2005) (internal
17 quotations omitted). Here, all of Plaintiffs’ claims relate to mislabeling Healthy Request
18 Gumbo as a healthy product. Thus, Plaintiffs seek to apply the UCL, FAL, CLRA, and
19 Commercial Code in a way that would impose labeling requirements, implicating the first
20 condition of the express preemption provisions. *Meaunrit v. The Pinnacle Foods Grp.,*
21 *LLC*, No. C 09-04555 CW, 2010 WL 1838715, at *6 (N.D. Cal. May 5, 2010).

22 The question then is whether the state law requirements are additional or different
23 than the federal requirements. Several courts have held that they are, *see, e.g., Meaunrit*,

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⁴ The Supremacy Clause of the U.S. Constitution empowers Congress to make federal laws that preempt state law. *See* U.S. Const. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land.”). One type of preemption is express preemption, which occurs “when a [federal] statute explicitly addresses preemption.” *Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9th Cir. 2015).

1 2010 WL 1838715, at *7, and this Court agrees. The statutes prohibit “false or
2 misleading” labels. 21 U.S.C. §§ 457, 607. FSIS reviewed Healthy Request Gumbo’s
3 labeling to consider whether it is false or misleading and subsequently approved the label.
4 “The agency apparently found no fault” with Campbell Soup’s labeling of Healthy
5 Request Gumbo. *Meaunrit*, 2010 WL 1838715, at *7. “Nevertheless, a jury could
6 conclude that the labels should disclose more information or employ different language,
7 in which case it would introduce requirements in addition to or different from those
8 imposed by the USDA.” *Id.*; see also *Riegel*, 552 U.S. at 325 (explaining that a jury
9 would not evaluate a product’s design in the same way as regulators). Therefore,
10 Plaintiffs’ claims impose additional or different requirements than the PPIA and FMIA
11 and are preempted. Because Plaintiffs’ claims are preempted, they cannot state a
12 plausible claim and the motion to dismiss must be **GRANTED**.⁵

13 **III. CROSS-MOTIONS FOR RULE 11 SANCTIONS**

14 Defendant brings a motion for sanctions under Federal Rule of Civil Procedure 11,
15 contending that Plaintiffs’ attorney, Jack Fitzgerald, violated his certifications under that
16 rule when he filed the complaint. It contends that the complaint is legally baseless
17 because Plaintiffs’ claims are expressly preempted by federal law, a conclusion which
18 numerous courts have recognized. Campbell Soup argues that Mr. Fitzgerald was aware
19 that the claims are preempted because, in pre-complaint correspondence, its counsel
20 detailed the company’s position to him in a letter. According to Campbell Soup, Mr.
21 Fitzgerald’s attempt to challenge the straightforward application of the express
22 preemption provisions is sanctionable. It seeks an award of \$25,000 for itself, which
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26 ⁵ Plaintiffs argue that their claims are not expressly preempted because the USDA’s label
27 approval process is not sufficiently formal to have preemptive effect. They do not
28 present any case law to directly support this proposition. Instead, they cite case law
discussing other statutes and regulatory schemes. Given this difference, the Court finds
these cases unpersuasive.

1 represents part of its attorneys’ fees in preparing the Rule 11 motion, and a penalty of
2 \$60,000 to be paid to the Court.

3 Plaintiffs responded with their own motion for Rule 11 sanctions. They argue that
4 their claims are not preempted because FSIS’s allegedly cursory label review and
5 approval process cannot be given preemptive effect. They primarily rely on a 2015 Ninth
6 Circuit decision about false food labeling, *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th
7 Cir. 2015). That case did not concern the PPIA, FMIA, or FSIS approval. Rather, it
8 involved a different labeling law, the Food, Drug, and Cosmetic Act (“FDCA”), and the
9 FDA’s regulations and actions pursuant to that statutory authority. Plaintiffs contend,
10 however, that the reasoning of *Reid* should apply here. They argue that because they
11 present good arguments against preemption, Defendant has filed a frivolous sanctions
12 motion, which itself is a sanctionable event.

13 Although the Court ultimately agrees that Plaintiffs’ claims are preempted, their
14 arguments against preemption are not frivolous or legally baseless. Campbell Soup’s
15 motion for Rule 11 sanctions is **DENIED**.

16 The Court also **DENIES** Plaintiffs’ cross-motion. Defendant filed its motion in
17 reliance on federal statutory law and case law finding similar claims preempted under the
18 PPIA and FMIA, and it ultimately won on its preemption argument. Its decision to file a
19 Rule 11 motion was not baseless.

20 CONCLUSION

21 Defendant’s motion to dismiss is **GRANTED**. (ECF No. 17). Defendant’s motion
22 for Rule 11 sanctions is **DENIED**. (ECF No. 18). Plaintiffs’ cross-motion for Rule 11
23 sanctions is **DENIED**. (ECF No. 20).

24 **IT IS SO ORDERED.**

25 Dated: March 21, 2017

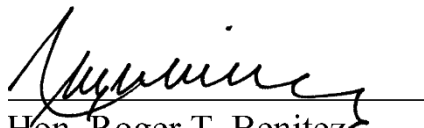
26 
27 Hon. Roger T. Benitez
28 United States District Judge

Exhibit C

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Defendant.

Case No. 16-cv-1005-BEN-AGS

EXHIBIT C - SERVICE LIST

Judge: Hon. Roget T. Benitez

SERVICE LIST FOR APPEAL

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23 **UNITED STATES DISTRICT COURT**
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Case No. 16-cv-1005-BEN-AGS

CERTIFICATE OF SERVICE

1 I hereby certify that on March 24, 2017, I served the following documents on counsel
2 of record for all parties by notice of electronic filing, which was automatically generated by
3 the Court’s CM/ECF system at the time the documents were filed with the Court: (1)
4 Plaintiffs’ Notice of Appeal, and (2) Certificate of Service.

5
6 Dated: March 24, 2017

/s/ Jack Fitzgerald

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